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NO. 94-1632

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BENJAMIN F. CADES
Petitioner

v.

H & R BLOCK, INCORPORATED
and BENEFICIAL NATIONAL BANK
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to revisit its unanimous holding in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), that a national bank is "located" in its home state, notwithstanding loan-related activities conducted in other states, and that the bank may therefore charge whatever interest is permitted by the law of its home state pursuant to section 85 of the National Bank Act, 12 U.S.C. § 85?

2. Should this Court grant certiorari to review the fact-specific determination by the Court of Appeals and the District Court that Petitioner was not contractually bound on a credit transaction at the time that he was given his disclosures under the Truth in Lending Act?

3. Should this Court grant certiorari to review the fact-specific determination by the Court of Appeals and the District Court that the loan made to Petitioner was a demand loan for purposes of calculating the annual percentage rate under the Truth in Lending Act?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were as follows:

(a) The Plaintiff was Benjamin F. Cades, an individual.[1] He brought suit on his own behalf and purportedly on behalf of a class of similarly situated persons. He is the Petitioner before this Court.

(b) H & R Block, Inc., a Defendant below and a Respondent before this Court, is a corporation with no parent companies and no United States subsidiaries (except wholly owned subsidiaries). Some shares of certain foreign subsidiaries are owned by employees or legal representatives of H & R Block, Inc., or its wholly owned subsidiaries, in order to comply with corporation statutes and regulations of the foreign countries in which they operate.

(c) Beneficial National Bank, the other Defendant below and the other Respondent before this Court, is a wholly owned subsidiary of Beneficial Corporation. Beneficial Corporation has a partially owned subsidiary, Flashtax, Inc. Beneficial Corporation has no parent company and no other subsidiaries (except wholly owned subsidiaries). Beneficial National Bank has no subsidiaries (except wholly owned subsidiaries).

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[1] Mr. Cades' name was incorrectly spelled as "Cade" in his pleadings, and the caption in the District Court therefore reflected that misspelling. In the Court of Appeals, the caption was corrected to reflect the proper spelling.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners' citation to the opinion of the United States Court of Appeals for the Fourth Circuit is incorrect. The opinion appears at 43 F.3d 869 (4th Cir. 1994).

The opinions of the United States District Court for the District of South Carolina have not been officially published, but appear at 1993 U.S. Dist. LEXIS 19038-19043 (D.S.C. 1993).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are set out in the appendix hereto:

Section 81 of the National Bank Act, 12 U.S.C § 81 (Rev. Stat. § 5190)

Section 85 of the National Bank Act, 12 U.S.C § 85 (Rev. Stat. § 5197)

Section 111 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, 2365 (codified at 12 U.S.C. § 1811 note)

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Del. Code Ann. tit. 5, § 965(1)

STATEMENT OF THE CASE

I. HISTORY OF PROCEEDINGS

This action relates to a consumer financial service known as tax refund anticipation loans ("RAL's"), under which taxpayers who expect to receive federal income tax refunds may gain access to their funds on an expedited basis by obtaining demand loans in the anticipated amount of their tax refunds. In 1991 and 1992, Petitioner Benjamin F. Cades ("Cades") obtained RAL's from Respondent Beneficial National Bank ("Beneficial") in connection with the filing of his federal income tax returns through the services of Respondent H & R Block, Inc. ("Block"), in South Carolina. He now claims, purportedly on behalf of a class of similarly situated borrowers,[2] that the RAL program is in

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[2] No class was ever certified by the District Court.

violation of the usury requirements of the National Bank Act and the disclosure requirements of the Truth in Lending Act.

Cades originally brought suit against Beneficial and Block in South Carolina state court, and Respondents removed the case to the United States District Court for the District of South Carolina. Following the denial of his motion to remand, Cades filed an Amended Complaint, asserting violations of section 85 of the National Bank Act, 12 U.S.C. § 85, which limits the interest that may be charged on a loan by a national bank, and of provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, regulating the timing and content of disclosures to be made in consumer loans. Acting on subsequently filed motions for summary judgment, the District Court held that the RAL program was in full compliance with these laws, and it therefore granted summary judgment in favor of Respondents.[3]

Cades appealed to the United States Court of Appeals for the Fourth Circuit, which unanimously affirmed.[4] Addressing first Cades' claim for usury, the Court of Appeals noted that Cades relied on section 85 of the National Bank Act, which authorizes a national bank such as Beneficial to charge whatever interest is permitted by the law of the state where the bank is "located." 12 U.S.C. § 85. Applying this Court's opinion in *Marquette*

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[3] The District Court also granted summary judgment to Beneficial and Block on the claims asserted by Cades under South Carolina state law.

[4] The Court of Appeals held that irrespective of any issue of the District Court's jurisdiction over Cades' original Complaint, there was indisputably federal jurisdiction over his Amended Complaint, which expressly asserted claims arising under federal statutes. *Cades v. H & R Block, Inc.*, 43 F.3d 869, 873 (4th Cir. 1994) (Pet. 6a-7a) (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16 (1951)).

National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), that a national bank is "located" in the state of its charter address for purposes of section 85, the Court of Appeals held that Beneficial is "located" in Delaware and can therefore charge on its RAL's the interest permitted by Delaware law. Since the law of Delaware authorizes the finance charge assessed by Beneficial in this case, the Court of Appeals determined that the District Court had properly granted summary judgment against Cades on the usury claim. *Cades v. H & R Block, Inc.*, 43 F.3d 869, 873-74 (4th Cir. 1994) (Pet. 7a-11a).

The Court of Appeals then turned to Cades' two claims under the Truth in Lending Act ("TILA"). Cades first challenged Beneficial's practice of treating RAL's as demand loans for the purpose of calculating the annual percentage rate ("APR") disclosed to Cades and other RAL customers. The Court of Appeals carefully examined the wording of the loan documents between Beneficial and Cades and determined that the RAL's *were* in fact demand loans and, thus, were properly treated as such for purposes of calculating the APR. Therefore, the APR was correctly calculated. *Id.* at 874-75 (Pet. 11a-13a).

Cades' second claim under TILA asserted that the required disclosures should have been provided to him at the time that he applied for a RAL, rather than at the time that the check for the loan proceeds was made available to him. Applying a regulation of the Federal Reserve Board that permits disclosures to be given at any time before the consumer becomes contractually obligated on a credit transaction, the Court of Appeals again scrutinized the wording of the application and other loan documents signed by Cades. The Court of Appeals concluded that Cades was *not* contractually obligated on a credit transaction by signing the loan application form and that he did not become so bound until he

signed a formal Loan Agreement on the loan check itself. Accordingly, the Court of Appeals concluded that the truth-in-lending disclosures were provided on a timely basis. *Id.* at 875-76 (Pet. 13a-15a).

Since the District Court had properly granted summary judgment in favor of Beneficial and Block on each of these claims, the Court of Appeals affirmed the District Court's judgment in full.[5] Cades has petitioned for certiorari to review the judgment of the Court of Appeals on each of these three claims. In opposition, Respondents submit that certiorari is clearly not warranted. Cades' usury claim involves nothing more than a routine application of this Court's decision in *Marquette*, and his claims under the Truth in Lending Act turn not on any question of interpreting the statute and implementing regulations, but rather on the construction of the particular loan documents signed between Cades and Beneficial. Notwithstanding Cades' contentions, there is no conflict among the Courts of Appeals on any of the issues raised in his petition; to the contrary, the law in this area is well settled. Cades has not identified any novel or significant issue deserving review by this Court. Accordingly, certiorari should be denied.

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[5] The Court of Appeals held that it need not address the District Court's grant of summary judgment on Cades' state-law claims, since Cades had not addressed those claims in his brief. *Id.* at 876 (Pet. 16a) (citing *United States v. Williams*, 378 F.2d 665, 666 (4th Cir. 1967)).

II. STATEMENT OF FACTS

The material facts are not in dispute.[6] Beneficial is a national banking association chartered under the National Bank Act. Its charter address is in Wilmington, Delaware. Block is a corporation that offers tax consultation and preparation services nationwide through a network of retail offices operated by Block and its franchisees. There is no corporate affiliation between Beneficial and Block.

Block offers its customers the opportunity to file their tax returns with the Internal Revenue Service electronically. For several years, including 1991 and 1992, the years covered by his Amended Complaint, Cades availed himself of this opportunity. Block charged to Cades its established fee charged to any customer who files a return electronically. This fee applies, regardless of whether the customer also applies for a RAL. No part of this fee is paid to Beneficial.

Beneficial has entered into an arrangement with Block, under which Block makes RAL applications available to customers of certain Block offices who file their tax returns electronically.

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[6] The material facts were established by uncontroverted affidavits filed in the District Court in connection with Respondents' motions for summary judgment. Cades did not argue in the Court of Appeals, and does not assert in his petition for certiorari, that there was any genuine dispute as to the material facts that would preclude the District Court from entering summary judgment.

It should be noted that the facts established in the District Court related to the RAL program as it existed during the time period covered by Cades' pleadings, and therefore do not take account of more recent changes to the RAL program.

Other Block offices make available RAL applications from lenders other than Beneficial. All Block offices (including those that make Beneficial RAL applications available to their customers) are established without any consultation with or involvement by Beneficial. Beneficial does not control or determine the location or hours of Block offices and does not supervise Block operations. No Beneficial personnel are located at Block offices, and the Block offices are not advertised or otherwise held out to be offices of Beneficial. Beneficial does not pay rent in any form to Block or own any interest in the Block offices.

If the customer of a Block office that makes Beneficial RAL applications available wishes to apply for a loan, Block transmits the application to Beneficial in Delaware. All processing of the loan application and review of the applicant's credit information are performed by Beneficial at its offices in Delaware. If the loan is approved, a cashier's check for the loan proceeds is issued by Beneficial National Bank and can be picked up by the customer at a local Block office.

In each of his RAL transactions in 1991 and 1992, Cades signed two critical documents. In the first document, the Application,[7] Cades provided various identifying information and authorized the release of the information on his tax return to Beneficial "for the purpose of enabling [Beneficial] to determine whether or not to make a Refund Anticipation Loan ('RAL') to me in response to my application." As the quoted language suggests, there is nothing in the Application that obligated Beneficial to make the loan or that obligated Cades to accept the loan if

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[7] The title of the Application in 1991 was "Priority Application, Consent, Certification and Authorization for Rapid Refund." In 1992, the title was "Priority Application, Certification and Authorization for Rapid Refund."

approved by Beneficial. The Application also authorized Beneficial to establish a deposit account in Cades' name and to have his tax refund deposited into that account. Finally, by signing the Application, Cades transferred to Beneficial his interest in the proceeds of the tax refund, to the extent of any RAL issued to him.

The other loan document, presented to the borrower only if the Application is approved, is a multi-purpose document containing (1) truth-in-lending disclosures on a detachable stub; (2) the actual "Loan Agreement," providing that the customer shall pay Beneficial, "on demand," the amount of the loan; and (3) the check made payable to the customer, constituting the loan proceeds. By endorsing the check, Cades signed and accepted the Loan Agreement, thereby obligating himself for the first time to repay the loan.

The stub attached to the Loan Agreement and check itemizes the finance charge assessed by Beneficial for the loan. Beneficial's charge for a RAL to South Carolina customers is a flat fee of $29, regardless of the amount of the loan. This interest charge is deducted from the proceeds of the loan before they are disbursed to the customer. No other charge is assessed by Beneficial.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE HOLDING THAT BENEFICIAL MAY CHARGE THE INTEREST PERMITTED BY THE LAW OF ITS HOME STATE, SINCE THAT HOLDING IS CONSISTENT WITH – AND COMPELLED BY – THIS COURT'S DECISION IN *MARQUETTE*.

Cades' usury claim alleges that the $29 interest charge assessed by Beneficial was in violation of section 85 of the National Bank Act. Section 85 provides that a national bank may "charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District *where the bank is located* . . . ." 12 U.S.C. § 85 (emphasis added). As the statutory language makes clear, the limitations on interest that a national bank may charge are governed by the laws of the state where the *bank* is located, not the laws of the state where the *borrower* is located or the state where the loan is made. In the present case, Beneficial is located in Wilmington, Delaware, the address of its home office as stated in its charter. Accordingly, the Court of Appeals correctly concluded that Beneficial's flat $29 interest charge is lawful under section 85, because it is permitted by Delaware law.[8]

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[8] Cades' petition does not question the conclusion reached by both the Court of Appeals, 43 F.3d at 874 (Pet. 9a-10a), and the District Court that Delaware law permits the $29 interest charge assessed by Beneficial. *See* Del. Code Ann. tit. 5, § 965(1) (providing that "[i]n addition to or in lieu of periodic interest . . . a bank may charge and collect, as interest, . . . [l]oan fees . . . and other front-end . . . charges," provided that "the agreement governing . . . the loan so provides").

The leading case applying section 85 to interstate loan transactions is the unanimous opinion of this Court in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). In *Marquette*, the First National Bank of Omaha ("Omaha Bank"), a national bank with its charter address in Nebraska, actively solicited credit card customers in Minnesota, through a subsidiary doing business in Minnesota, which acted as agent for the bank. *See id.* at 304-06. Participating correspondent banks in Minnesota solicited applications from prospective credit card customers on behalf of Omaha Bank. These Minnesota banks also served as depositories for credit card sales drafts and made cash advances to Omaha Bank's credit card customers, in exchange for a fee paid to the participating Minnesota banks by Omaha Bank. *See id.* at 311 n.24.

Suit was brought by the Minnesota attorney general and a Minnesota bank, seeking to enjoin Omaha Bank from charging its Minnesota credit card customers interest rates that were permitted by Nebraska law but in excess of the usury limit under Minnesota law. The Court rejected these claims. It held that despite the active solicitation of Minnesota customers through a subsidiary qualified to do business in Minnesota, and despite the role of the participating Minnesota banks, Omaha Bank was nevertheless "located" in Nebraska, at the address specified in its charter, for purposes of section 85. The Court noted that this meaning of the term "located" was intended by Congress when it enacted the National Bank Act:

> The congressional debates surrounding the enactment of § 30 [later recodified as section 85] were conducted on the assumption that a national bank was "located" for purposes of the section in the State named in its organization certificate. Omaha Bank cannot be

> deprived of this location merely because it is extending credit to residents of a foreign State.

Id. at 310 (citation omitted). The Court further rejected the contention that the role played by merchants and participating banks in Minnesota established a "location" for Omaha Bank in Minnesota for purposes of the credit card transactions. The Court explained:

> If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. We do not choose to invite these difficulties by rendering so elastic the term "located."

Id. at 312. Because the national bank was "located" in Nebraska, the Supreme Court held that it was entitled to "export" to borrowers in Minnesota the interest permitted under Nebraska law.

As the Court of Appeals concluded, Cades' claim under section 85 is controlled by a straightforward application of *Marquette*. Regardless of where Cades resides, where he applied for his loan, or where he received the loan proceeds, Beneficial is "located" in Delaware, its charter address, and the interest that it charges is therefore governed by the law of Delaware, not South Carolina. Cades' contention that the interest charge imposed by Beneficial is subject to the usury restrictions of the law of the borrower's state, rather than Beneficial's home state, is directly contrary to the holding in *Marquette*.

Cades does not expressly request that this Court reconsider its decision in *Marquette*, but in fact that is exactly what he would have the Court do. While Cades purports to rely on the solicitation efforts conducted on behalf of Beneficial in South Carolina, such efforts are legally indistinguishable from the solicitation activities conducted in *Marquette* on behalf of Omaha Bank in Minnesota. *See id.* at 302 ("[T]he solicitation of Minnesota merchants and banks is carried on by respondent First of Omaha Service Corp. . . . , a wholly owned subsidiary of [the national bank]."); *id.* at 304-05 (detailing services provided by First of Omaha Service Corp. in Minnesota for its national bank parent). As the stipulation of facts in *Marquette* recited:

> The First National Bank of Omaha has solicited and intends to solicit Minnesota residents *on a continuous and systematic basis*, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and *through Minnesota banks*.

Marquette Nat'l Bank v. First of Omaha Serv. Corp., 262 N.W.2d 358, 360 (Minn. 1977) (emphasis added), *aff'd*, 439 U.S. 299 (1978); *see also* 439 U.S. at 311 n.24 ("[P]articipating Minnesota banks . . . will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents . . . .").

Cades' efforts to distinguish *Marquette* are completely unavailing. Cades argues that all of the papers relating to his RAL's were signed in South Carolina; by the same token, Omaha Bank's credit card customers enrolled in the program in Minnesota, signed cash advance slips or credit purchase slips in

Minnesota, and received their cash or merchandise there. Cades argues that he had "face-to-face" contact with Block personnel in South Carolina; by the same token, Omaha Bank's credit card customers had face-to-face contact with participating banks and merchants from whom they obtained cash advances and credit sales. Cades is simply not able to show any material difference between Beneficial's contacts with South Carolina customers and Omaha Bank's "continuous and systematic" solicitation of customers in Minnesota in *Marquette*.[9] If anything, Omaha Bank's contacts with Minnesota were more substantial than Beneficial's contacts with South Carolina, since Omaha Bank conducted solicitaions in Minnesota through a subsidiary, but there is no affiliation between Beneficial and Block.

In the seventeen years since this Court's unanimous decision in *Marquette*, the banking industry has structured billions of dollars of interstate loan transactions on the basis of the certainty

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[9] As the Court of Appeals explained:

> [Cades'] asserted differences [between this case and *Marquette*] are not convincing. It is undisputed that the loan was approved in Beneficial's Delaware office, not in South Carolina. The loan proceeds originated in Delaware and were later transmitted to South Carolina. Both *Marquette* and this case involve face-to-face solicitation of out of state consumers by agents of a national bank. In both instances, the interest rate a national bank may charge is governed by section 85, which looks to the interest rates allowed by the state where the bank is located – not where the borrower is located or where the loan transaction may be said to have occurred.

43 F.3d at 873-74 (Pet. 8a).

that that holding has provided.[10] Only the most compelling justification would be sufficient to overturn the settled expectations and understandings of this nationwide industry. *See, e.g., State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457-58 (1962); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953). In the face of this long-standing and widespread reliance on the settled construction of section 85 under *Marquette*, Cades fails to state a single cogent reason why *Marquette* should be subject to reconsideration. Moreover, there has been no conflict among the decisions of the lower courts in applying this Court's opinion in *Marquette* to determine where a national bank is "located" under section 85.

The *Marquette* opinion also disposes of Cades' argument that the decision of the Court of Appeals, by allowing Beneficial to solicit loans through the offices of Block in other states, encourages evasion of federal restrictions on interstate branching by national banks. In *Marquette*, despite the extensive loan solicitation conducted by Omaha Bank through correspondent banks in Minnesota, the Court concluded that "[t]he bank operates no branch banks in Minnesota." 439 U.S. at 309. Thus, Cades' contention that the offices of Block in South Carolina should be

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[10] Indeed, the "exportation" principle of *Marquette* was met with such immediate and widespread approval that Congress promptly extended the doctrine to cover loans by federally insured state-chartered banks, *see* Depository Institutions Deregulation and Monetary Control Act of 1980, § 521, 12 U.S.C. § 1831d, federally insured savings and loan institutions, *see id.* § 522, 12 U.S.C. § 1463(g), and federal insured credit unions, *see id.* § 523, 12 U.S.C. § 1785(g). *See generally Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

held to be branches of Beneficial would again require reexamination of *Marquette*.[11]

Nor is reconsideration of *Marquette* justified by the recent *expansion* of the right of national banks to establish out-of-state branches, as effected by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338. To the contrary, the Riegle-Neal Act specifically *preserves*

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[11] Cades' reliance on *First National Bank v. Dickinson*, 396 U.S. 122 (1969), is without merit. In that case, the question was whether an armored car *owned and operated* by a national bank, at which customers could make deposits and cash checks, constituted a branch of the bank. The Court set forth the critical facts as follows:

> The armored car was owned and controlled by the bank; the teller and driver-guard in the car were bank employees. The bank paid the cost of armored car operations . . . . The truck bore the name of the bank . . . . All movements and routing of the armored car were directed by the bank.

Id. at 128. In the present case, by contrast, the Block offices are not owned and controlled by Beneficial; Beneficial pays no rent to Block and has no tenancy, leasehold or ownership interest in any Block office. The personnel in the Block offices are not Beneficial employees; no Beneficial personnel are located at these offices. Beneficial does not pay the cost of operations of the Block offices. The Block offices do not bear the name of Beneficial; they are advertised and held out as Block, not Beneficial, offices. Finally, the activities of the Block offices are not directed by Beneficial; Block, not Beneficial, determines office locations, hours, and methods of operation. *See* 43 F.3d at 874 (Pet. 9a.)

The Court of Appeals thus concluded that the Block offices could not conceivably be held to be "branches" of Beneficial, since they were not "establish[ed] and operate[d]" by Beneficial. *Id.* (quoting 12 U.S.C. § 36(c) and citing *Independent Bankers Ass'n v. Marine Midland Bank, N.A.*, 757 F.2d 453 (2d Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986)).

the exportation doctrine under section 85, as interpreted in *Marquette*. Section 111 of the Act, entitled "Restatement of Existing Law," provides: "No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way . . . the applicability of section 5197 of the Revised Statutes [i.e., section 85 of the National Bank Act]." 12 U.S.C. § 1811 note. In expressly preserving existing law under section 85 in the context of interstate banking, Congress undoubtedly was aware of the Court's statutory construction in *Marquette* and was endorsing the exportation doctrine enunciated in that opinion. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). There is no need for this Court to reexamine the application of a statute where Congress itself has recently explored the issue and has endorsed the Court's long-standing construction.

Finally, Cades argues that the decision of the Court of Appeals, by allowing banks like Beneficial to "export" the interest permitted by the laws of their home states to borrowers in other states, will frustrate the application of more restrictive usury laws in the borrowers' states. Once again, *Marquette* provides the answer. As this Court held:

> Petitioners' final argument is that the "exportation" of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act . . . . But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

439 U.S. at 318-19.

Before the Court of Appeals, certain amici curiae in support of Cades expressed a concern that the lower courts' application of section 85 may be extended to *other* factual situations in which federal restrictions on interstate branching may be evaded. This inchoate fear, however, is no basis for disregarding the clearly established law under section 85. The ruling of the Court of Appeals applies to a particular factual situation, in which the operations of the Block offices indisputably are not controlled by Beneficial, and where there is no affiliation between Block and Beneficial. The determination whether the same reasoning would apply to a *different* set of facts, involving control or affiliation of the sort feared by Cades' amici, should await the presentation of a concrete case or controversy presenting those facts.

In short, while Cades insists that the decision of the Court of Appeals is contrary to *Marquette*, in fact it is Cades' own arguments that are inconsistent with *Marquette*. Moreover, Cades provides no reason -- much less a compelling one -- that this Court should reexamine the settled construction of a statute that has been relied upon by the banking industry for the past seventeen years, and that Congress itself has recently declined to alter. In short, there is no reason for the Court to grant certiorari to review the application by the Court of Appeals of the settled doctrine of *Marquette* in rejecting Cades' claims under section 85 of the National Bank Act.[12]

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[12] Cades also claims that Beneficial has violated section 81 of the National Bank Act, 12 U.S.C. § 81, requiring the general business of a bank to be conducted at its main office and established branches. Cades did not plead a claim under section 81 in the District Court, and it is therefore waived. In any event, since the inception of the Act, this Court has held that section

II. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW CADES' CLAIMS UNDER THE TRUTH IN LENDING ACT, WHICH TURN ON THE SPECIFIC LOAN DOCUMENTS SIGNED BY THE PARTIES.

A. Beneficial's Truth-in-Lending Disclosures Were Timely, Because the Loan Documents Make Clear that the Loan Was Not Consummated Until Cades Endorsed His Loan Proceeds Check.

One of Cades' claims under the Truth in Lending Act is that Beneficial, by including the TILA disclosures on the stub attached to the Loan Agreement, failed to provide the disclosures before the loan was "consummated," as required by section 226.17(b) of Regulation Z, 12 C.F.R. § 226.17(b).[13] Cades acknowledges

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81 should be interpreted "reasonably" and does not preclude a bank's conduct of business "by correspondents or other agents." *Merchants' Bank v. State Bank*, 77 U.S. (10 Wall.) 604, 651 (1871). Moreover, nothing in *Marquette* suggests that Omaha Bank's extensive solicitation activity in Minnesota placed it in violation of section 81. Finally, Cades cites no authority for the proposition that a violation of section 81, even if shown, would subject a bank to the usury law of a borrower's state, contrary to section 85.

[13] The Federal Reserve Board has adopted Regulation Z, 12 C.F.R. pt. 226, to implement TILA, pursuant to its authority under section 105 of the Act, 15 U.S.C. § 1604. *See* 12 C.F.R. § 226.1. In addition, the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues the Official Staff Commentary, which constitutes official interpretations of the Act and Regulation Z. *See* 12 C.F.R. pt. 226, supp. I, cmt. I-1. These regulations and interpretations are authoritative and should be followed unless "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Moreover, TILA § 130(f), 15 U.S.C. § 1640(f), provides that good faith compliance by a creditor with an interpretation issued by the staff of the Federal Reserve Board constitutes a

that Beneficial's disclosures were timely if the loan was consummated at the time that he signed the Loan Agreement, but he insists that the loan was consummated previously, at the time that he signed the Application. He therefore contends that the disclosures should have been given at the time that he signed the Application. The Court of Appeals correctly determined, however, that Cades' argument cannot survive scrutiny of the written terms of the Application itself.

Section 226.2(a)(13) of Regulation Z defines "consummation" as "the time that a consumer becomes *contractually obligated* on a credit transaction." 12 C.F.R. § 226.2(a)(13) (emphasis added). Applying this definition, the lower courts have *uniformly* held that TILA disclosures need not be provided at the time that a consumer signs a loan application, unless by signing the application the consumer becomes "contractually obligated on a credit transaction." Contrary to the suggestion in Cades' petition, there is *no conflict* among the Circuits on this point. The two cases cited by Cades make clear that TILA disclosures must be provided prior to closing only when the terms of a loan application or other pre-closing document contractually bind the consumer to accept the loan that is provided by the lender; conversely, where the terms of the application do not have this effect, and the consumer first becomes contractually bound on a credit transaction at closing, then TILA disclosures may be provided at the closing itself, at any time prior to the consumer's execution of the loan agreement. *See Murphy v. Empire of America, FSA*, 746 F.2d 931 (2d Cir. 1984) (where loan commitment obligated consumers to proceed with loan, disclosures had to be given prior to signing of that document); *Waters v. Weyerhaeuser Mortgage Co.*, 582 F.2d 503, 505 (9th

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complete defense to claims for violation of the Act.

Cir. 1978) (in absence of such a pre-closing obligation, disclosures given at closing were timely); *see also Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245 (D.C. Cir. 1973); *Puckett v. Georgia Homes, Inc.*, 369 F. Supp. 614 (D.S.C. 1974); *Stavrides v. Mellon Nat'l Bank & Trust Co.*, 353 F. Supp. 1072, 1078-79 (W.D. Pa.), *aff'd*, 487 F.2d 953 (3d Cir. 1973). Since no case holds to the contrary, it is clear that Cades is attempting to manufacture the appearance of a conflict where none in fact exists.[14]

Cades' claim of untimely disclosure thus boils down to the question whether the terms of Beneficial's RAL Application "contractually obligated" him to accept a RAL if his Application was approved. Both the District Court and the Court of Appeals carefully scrutinized the language of the Application and determined that under applicable law, no such contractual obligation was created. There is no need for this Court to exercise its certiorari jurisdiction to reexamine the lower courts' construction of a particular form of loan document, especially where all four judges in the District Court and Court of Appeals have agreed on the appropriate construction.[15]

In any event, this construction of the Application is undoubtedly correct. There is nothing in the Application

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[14] Exceptions exist under Regulation Z for certain types of loans, such as certain residential mortgage transactions and certain variable-rate transactions, where there are special timing requirements based on the signing of the loan application. *See* 12 C.F.R. § 226.17(b). None of these exceptions apply here.

[15] Moreover, yet another District Judge has reached the same construction in another case asserting virtually the identical claim. *See Beckett v. H & R Block, Inc.*, 1994 U.S. Dist. LEXIS 17714 (N.D. Ill. Dec. 8, 1994).

submitted to Beneficial by Cades that "contractually obligated [him] on a credit transaction." 12 C.F.R. § 226.2(a)(13). To the contrary, Cades first became "contractually obligated" when he signed the Loan Agreement, through his endorsement of the RAL check. This was the same document that contained, on its stub, the truth-in-lending disclosures. Accordingly, before Cades signed the Loan Agreement, he had in his hand the truth-in-lending disclosures for his review. *See* Official Staff Commentary, 12 C.F.R. pt. 226, supp. I, cmt. 17(a)(1)-3 (disclosures "may be placed on the same document with the credit contract" and may appear "on the front or back" of the document).

Significantly, the only language cited by Cades, in support of his position that he became bound to take a loan by signing the Application, is a provision for the direct deposit of his tax refund by the IRS to Cades' account at Beneficial. Although the direction to the IRS is irrevocable, it does *not* contractually commit Cades to a credit transaction with Beneficial. If Cades had decided not to consummate the RAL, by declining to sign the Loan Agreement and endorse the RAL check, then his refund would have been available to him through his account at Beneficial, once it was transmitted by the IRS to that account as Cades had directed. As the Court of Appeals explained:

> [W]e reject Cades's argument that his irrevocable assignment of his tax refund to his account at Beneficial, through his direct deposit election on IRS Form 8453, effectively transferred all his rights in the refund to Beneficial. Funds in a depositor's account, absent an agreement to the contrary, represent a debt by the bank to the depositor and may be withdrawn by the depositor upon demand.

43 F.3d at 876 (Pet. 15a) (citing *Bank of Marin v. England*, 385 U.S. 99, 101 (1966)). The Court of Appeals further held, under the applicable state law of Delaware and South Carolina, that Beneficial had no enforceable security interest in Cades' tax refund until he signed the Loan Agreement by endorsing his RAL check. *Id.* (Pet. 14a).[16]

Because the decision below rests on the construction of a particular set of loan documents in accordance with applicable state law, and because the construction was in any event correct, Cades' claim of untimely disclosure under the TILA does not merit review by this Court.

B. Beneficial's Calculation of the Annual Percentage Rate Complies with Federal Reserve Board Requirements, Because the Loan Documents Make Clear that the RAL Is Payable on Demand.

Cades' other claim under the TILA relates to the manner of calculation of the annual percentage rate in the disclosures made by Beneficial. It is undisputed that Beneficial calculated the APR

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[16] Cades further argues that even if the loan was not consummated until he signed the Loan Agreement on the RAL check, the TILA disclosures were given to him "at the same time" as consummation, rather than "before" consummation. The argument rests on a verbal sleight-of-hand. Consummation did not occur at the "time that a check [was] handed to Cades," (Pet. 12), but at the *subsequent* time when Cades *endorsed* the check and thus signed the Loan Agreement. The Official Staff Interpretation and case law cited above, holding that TILA disclosures may be given at the loan closing and may appear on the same document as the promissory note, make clear that it is sufficient to hand the disclosures to the consumer immediately before the consumer signs the applicable contract. No case holds otherwise.

on the basis of a presumed one-year maturity date for the loan, pursuant to section 227.17(c)(5) of Regulation Z, which mandates a specific method of disclosure for demand obligations:

> If an obligation is payable on demand, the creditor shall make the disclosures based on *an assumed maturity of 1 year*. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures shall be based on that date.

12 C.F.R. § 226.17(c)(5) (emphasis added).[17]

Cades acknowledges that the Loan Agreement that he signed provides that the loan is payable "on demand." He contends, however, that his loan also had an "alternate maturity date" that takes the loan out of the one-year maturity rule of section 227.17(c)(5). The Official Staff Commentary on this section of Regulation Z states: "Whether an alternate maturity date is stated in the legal obligation is determined by applicable law. " 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(5)-1. Thus, resolution of this claim, like Cades' other TILA claim, depends on the language of the loan documents and applicable state law. As discussed above, such matters are not appropriate for review on certiorari by this Court.

Once again, the treatment of this claim by the Court of Appeals was thorough and proper. The Court of Appeals carefully reviewed the language of the loan documents and concluded that

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[17] Cades' Petition asserts that the Court of Appeals "failed to read" the second sentence of this provision. (Pet. 13.) In fact, the second sentence is quoted in full in the opinion of the Court of Appeals, 43 F.3d at 875 (Pet. 12a), and is the focus of the court's discussion of Cades' APR claim.

the loan was in fact a demand obligation and that no "alternate maturity date" was stated. The Court of Appeals specifically rejected Cades' contention that an "alternate maturity date" was established by IRS Form 8453, which states that the taxpayer's refund should be issued within three weeks after the IRS has accepted the taxpayer's return. As the Court of Appeals explained:

> Form 8453 says nothing about when the RAL is payable. It merely provides taxpayers an estimate of when refund checks will arrive. Nor does the loan agreement anywhere provide that the RAL is payable immediately after the IRS deposits the refund into the account at Beneficial. The agreement between Cades and Beneficial is, by its terms, a demand obligation. Beneficial properly based the APR of the loan on a maturity date of one year.

43 F.3d at 875 (Pet. 13a). The Court of Appeals further recognized that under the comment issued by the Federal Reserve Board dealing specifically with refund anticipation loans, the existence of an "alternate maturity date" is to be determined "under the terms of the legal obligation," and *not* on the basis of the "practice of a creditor to demand repayment upon delivery of refunds."[18]

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[18] Comment 17 of the Official Staff Commentary on section 226.17(c)(1) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(1)-17, is entitled "Special Rules for Tax Refund Anticipation Loans." It is quoted in full in the appendix hereto.

There is, in short, no need to grant certiorari on this unique issue, the resolution of which depends on the terms of the particular loan documents signed by the parties.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

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APPENDIX

APPENDIX OF STATUTES AND REGULATIONS

Section 81 of the National Bank Act, 12 U.S.C. § 81 (Rev. Stat. § 5190) provides:

Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 5155 of the Revised Statutes, as amended by this Act.

Section 85 of the National Bank Act, 12 U.S.C. §85 (Rev. Stat. § 5197) provides:

Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding

> 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Section 111 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, 2365 (codified at 12 U.S.C. 1811 note) provides:

> **Restatement of Existing Law**
>
> No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way –
>
> > (1) the authority of any State or political subdivision of any State to adopt, apply, or administer any tax or method of taxation to any

bank, bank holding company, or foreign bank, or any affiliate of any such bank, bank holding company, or foreign bank, to the extent that such tax or tax method is otherwise permissible by or under the Constitution of the United States or other Federal law;

(2) the right of any State, or any political subdivision of any State, to impose or maintain a nondiscriminatory franchise tax or other nonproperty tax instead of a franchise tax in accordance with section 3124 of title 31, United States Code; or

(3) the applicability of section 5197 of the Revised Statutes or section 27 of the Federal Deposit Insurance Act.

Section 226.2(a)(13) of Regulation Z, 12 C.F.R. § 226.2(a)(13) provides:

Definitions and rules of construction.

(a) *Definitions.* For purposes of this regulation, the following definitions apply:

* * * *

(13) *"Consummation"* means the time that a consumer becomes contractually obligated on a credit transaction.

Section 226.17(b) of Regulation Z, 12 C.F.R. § 226.17(b) provides:

> **General disclosure requirements.**
>
> * * * *
>
> (b) *Time of disclosures.* The creditor shall make disclosures before consummation of the transaction. In certain residential mortgage transactions, special timing requirements are set forth in § 226.19(a). In certain variable-rate transactions, special timing requirements for variable-rate disclosures are set forth in § 226.19(b) and § 226.20(c). In certain transactions involving mail or telephone orders or a series of sales, the timing of disclosures may be delayed in accordance with paragraphs (g) and (h) of this section.

Section 226.17(c)(5) of Regulation Z, 12 C.F.R. § 226.17(c)(5) provides:

> **General disclosure requirements.**
>
> * * * *
>
> (c) *Basis of disclosures and use of estimates.*
>
> * * * *
>
> (5) If an obligation is payable on demand, the creditor shall make the disclosures based on an assumed maturity of 1 year. If an alternate maturity

> date is stated in the legal obligation between the parties, the disclosures shall be based on that date.

Official Staff Comment 3 on section 226.17(a)(1) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(a)(1)-3 provides:

> *Location.* The regulation imposes no specific location requirements on the segregated disclosures. For example:
>
> - They may appear on a disclosure statement separate from all other material.
>
> - They may be placed on the same document with the credit contract or other information, so long as they are segregated from that information.
>
> - They may be shown on the front or back of a document.
>
> - They need not begin at the top of a page.
>
> - They may be continued from one page to another.

Official Staff Comment 17 on section 226.17(c)(1) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(1)-17 provides:

> *Special rules for tax refund anticipation loans.* Tax refund loans, also known as refund anticipation loans (RALs), are transactions in which a creditor will lend up to the amount of a consumer's expected tax refund.

RAL agreements typically require repayment upon demand, but also may provide that repayment is required when the refund is made. The agreements also typically provide that if the amount of the refund is less than the payment due, the consumer must pay the difference. Repayment often is made by a preauthorized offset to a consumer's account held with the creditor when the refund has been deposited by electronic transfer. Creditors may charge fees for RALs in addition to fees for filing the consumer's tax return electronically. In RAL transactions subject to the regulation the following special rules apply:

- If, under the terms of the legal obligation, repayment of the loan is required when the refund is received by the consumer (such as by deposit into the consumer's account), the disclosures should be based on the creditor's estimate of the time the refund will be delivered even if the loan also contains a demand clause. The practice of a creditor to demand repayment upon delivery of refunds does not determine whether the legal obligation requires that repayment be made at that time; this determination must be made according to applicable state or other law. (See comment 17(c)(5)-1 for the rules regarding disclosures if the loan is payable solely on demand or is payable either on demand or on an alternate maturity date.)

- If the consumer is required to repay more than the amount borrowed, the difference is a finance charge unless excluded under § 226.4. In addition, to the extent that any fees charged in connection with the loan (such as for filing the tax return electronically) exceed those fees for a comparable cash transaction (that is,

filing the tax return electronically without a loan), the difference must be included in the finance charge.

Official Staff Comment 1 on section 226.17(c)(5) of Regulation Z, 12 C.F.R. pt. 226, supp. I, cmt. 17(c)(5)-1 provides:

> *Demand disclosures.* Disclosures for demand obligations are based on an assumed 1-year term, unless an alternate maturity date is stated in the legal obligation. Whether an alternate maturity date is stated in the legal obligation is determined by applicable law. An alternate maturity date is not inferred from an informal principal reduction agreement or a similar understanding between the parties. However, when the note itself specifies a principal reduction schedule (for example, "payable on demand or $2,000 plus interest quarterly"), an alternate maturity is stated and the disclosures must reflect that date.

Del. Code Ann. tit. 5, § 965(1) provides:

> **Interest Charges.**
>
> In addition to or in lieu of periodic interest at a periodic percentage rate or rates permitted by §§ 963 and 964 of this title, a bank may charge and collect, as interest, in respect of a loan:
>
> (1) Loan fees, points, finders fees and other front-end and periodic charges; provided, however, that in the case of a loan to an individual borrower, no such front-end or periodic charge may be charged and

collected unless the agreement governing, or the bond, note or other evidence of, the loan so provides;

(2) Reasonable fees for services rendered or for reimbursement of expenses incurred in good faith by the bank or its agents in connection with such loan, including, without limitation, commitment fees, official fees and taxes, premiums or other charges for any guarantee or insurance protecting the bank against the borrower's default or other credit loss, or costs incurred by reason by examination of title, inspection, recording and other formal acts necessary or appropriate to the security of the loan, filing fees, attorney's fees and travel expenses; provided, however, that in the case of a loan to an individual borrower, no such fee may be charged and collected unless the agreement governing, or the bond, note or other evidence of, the loan so provides.